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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-1131

In the Matter of

THE VENDO COMPANY,

Petitioner

BRIEF OF RESPONDENTS IN OPPOSITION TO VENDO'S MOTION FOR LEAVE TO FILE PETITION FOR MANDAMUS

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Petitioner The Vendo Company ["Vendo"] requests that this Court require compliance with its decision in *Vendo Co.* v. *Lektro-Vend Corp.*, 97 S. Ct. 2881 (1977), arguing that the preliminary injunction entered below should be dismissed "forthwith" and that this Court, if necessary, should issue a writ of mandamus to the District Court directing it to so act (Vendo's Petition for Writ of Mandamus ["Vendo Pet."], pp. 4-5).

There is nothing in the opinion of the Supreme Court or in its mandate, or in the mandate of the Circuit Court of Appeals, that directs "that the preliminary injunction should be dismissed forthwith." On the contrary, the judgment is a remand for the District Court to proceed in accordance with the opinion of the Supreme Court. Vendo's motion for leave to file a petition for mandamus is nothing more than an attempt by Vendo to force a summary disposition of its pending motion to dissolve the preliminary injunction, without a hearing on that motion in the District Court, and without even a ruling by the District Court.

Current Proceedings In The District Court

Vendo's motion to dissolve the preliminary injunction was filed in the District Court on September 16, 1977. Over the objections of Vendo, which sought summary dissolution of the injunction, the Court permitted respondents to file an answer to Vendo's motion, which was filed September 26, 1977. Vendo then filed a reply to respondents' answer on October 3, 1977.

On the same day, October 3, 1977, this Court denied respondents' petition for rehearing in *Vendo* v. *Lektro-Vend, supra.* Thereafter, two pretrial conferences were held in the district court before Judge Will in the month of October, in an effort to explore possible settlement of the litigation.

On November 4, the case was reassigned from Judge Will to Judge Roszkowski, who had been commissioned as a new federal judge on October 11. Judge Roszkowski was not sworn in until December 2. At that time, Judge Roszkowski received 315 civil cases and 30 criminal cases. Over 90 of the cases had pending one or more undecided motions that had been fully briefed, including four separate motions in this case.

In the meantime (after the case had been reassigned to Judge Roszkowski, but before he was sworn in), Vendo, on November 16, 1977, filed in this Court its Petition for Clarification, which was disposed of by this Court's *per curiam* opinion of January 23, 1978.

Two days later, on January 25, 1978, Vendo by letter sent Judge Roszkowski a copy of the *per curiam* opinion and again urged summary dissolution of the injunction (Vendo Pet., p. C-1). Respondents replied on January 31, 1978, stating that summary disposition of Vendo's motion to dissolve was unwarranted and suggesting that a hearing be held on Vendo's motion to dissolve and on respondents' answer thereto. Vendo's response on February 6, 1978 again urged that the preliminary injunction "be dissolved forthwith."

On February 10, Vendo served the instant Petition for Writ of Mandamus in this Court.

ARGUMENT.

A. This Motion And Petition Are Filed In The Wrong Court

Supreme Court Rule 31(3) requires a petitioner seeking issuance of a writ of mandamus to "set forth with particularity why the relief is not available in any other court." Vendo has not and cannot meet this essential prerequisite.

Vendo's motion and petition are bottomed on the failure of the District Court to act on Vendo's motion to dissolve the preliminary injunction. Vendo, however, has failed to present this matter to the United States Court of Appeals, but instead has come directly to this Court.*

This failure to present the question to the Court of Appeals is in direct contravention of the express terms of Supreme Court Rule 31, and on this ground alone the motion and petition must be denied.

Moreover, the judgment which Vendo seeks to enforce is the judgment of the Court of Appeals. That is the only judgment that the District Court has before it. That judgment states, in language similar to that of the Supreme Court in *Vendo* v. *Lektro-Vend, supra,* that "the matter is remanded to the district court for further proceedings, in conformity with the opinion of the United States Supreme Court rendered on June 29, 1977."

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* The only action ever taken by Vendo in the Court of Appeals was to argue, when the case was remanded from this Court to the Court of Appeals following decision in *Vendo* v. *Lektro-Vend,* that the Court of Appeals' judgment should state that the District Court must vacate the injunction on remand, rather than reverse the judgment and remand the cause for further proceedings in conformity with the Supreme Court opinion. This argument was, of course, made *before* the case was returned to the District Court and *before* Vendo filed the motion to dissolve in the District Court. Thus, the Court of Appeals has never been presented with or ruled on the instant petition, which seeks to mandamus the District Court for failing to (summarily) dissolve the preliminary injunction.

(Vendo Pet., p. B-1). Consequently, any attempt to mandamus the District Court should initiate in the Court of Appeals, not this Court.

B. Respondents Are Not Attempting To Obtain Relief In The District Court Denied Them On Rehearing In The Supreme Court; Rather, Respondents Seek New Relief Based On New Facts And Are Otherwise Proceeding In Conformity With This Court's Opinion.

Upon reversal and remandment by a reviewing court, the rights of the parties are determined, not on the facts as they existed at the time the injunction issued, but rather on the facts as they existed at the time the remandment order is presented to the District Court for decision. *Rudiger* v. *Coleman*, 126 N. E. 723, 328 N. Y. 225 (1920) (per Cardozo, J.).

Also, while the trial court is, of course, bound to give full effect to the mandate of the appellate court, it is "free to decide any matters left open by the appellate court's mandate." 9 *Moore's Federal Practice* ¶ 110.25[2]. This is the precise point made in the opinion cited by the Court in its *per curiam* opinion herein of January 23, 1978:

> ". . . the only matter which was or could be decided by this court, upon the record before it, was that the answer was sufficient. This court, in so deciding, could go no further than the Circuit Court could have done, had it made the like decision. Neither the Circuit Court, nor this court, upon adjudging that the answer was sufficient, could, without any consent or neglect on the part of the plaintiffs, deprive them of their right, under the general rules in equity, to file a replication.
>
> ". . . [W]hile the opinion declared that, assuming those facts, the mortgage was valid, yet both the opinion and the mandate ordered no final judgment for the defendant, but only ordered the judgment for the plaintiff to be reversed, and the cause remanded to the Circuit Court for

> further proceedings not inconsistent with the opinion of this court." *In Re Sanford Fork & Tool Co.*, 160 U. S. 247, 258 (1895).

The *Sanford* opinion continues:

> "The case being thus left open, by the opinion and mandate of this court, and by the general rules of practice in equity, for further proceedings, with a right in the plaintiffs to file a replication, putting the cause at issue, the Circuit Court might, in its discretion, allow amendments of the pleadings for the purpose of more fully or clearly presenting the facts at issue between the parties.
>
> "*The case is quite different, in this respect, from those in which the whole case,* or all but a subsidiary question of accounting, *had been brought to and decided by this Court upon the appeal,* as in the cases principally relied on by the petitioner.
>
> "It must be remembered, however, that no question, once considered and decided by this Court, can be reexamined at any subsequent stage of the same case." *Id.* at 259. (Citations omitted; emphasis added.)

The writ of mandamus was accordingly *denied* in *Sanford*.

The only question considered and decided by the Supreme Court in *Vendo* v. *Lektro-Vend* was whether the preliminary injunction, based on the record before the District Court and the findings of the Court, must be reversed (Per Curiam opinion, p. 1).

In the petition for rehearing, respondents urged that the findings, properly read in connection with the record, did not suffer from the deficiency found by the Supreme Court's concurring opinion and that Judge McLaren's findings, properly interpreted in the light of the evidence in the record, did encompass a finding of "a pattern of baseless, repetitive claims," even though the findings did not use those precise words.

The *per curiam* opinion sets forth respondents' contentions in the District Court in their answer to Vendo's motion to dissolve. The contrast between these contentions and those of the petition for rehearing is apparent.

In its answer to Vendo's motion to dissolve, respondents make the following contentions:

> 1. That the District Court should hold a new hearing so that respondents can present *further evidence, newly discovered since the prior hearing,* and make findings based thereon which would warrant a preliminary injunction against Vendo under the standards set forth in the concurring opinion.
>
> 2. That the District Court should make *new findings,* based on the evidence already in the record, of Vendo's pattern of baseless, repetitive litigation and of its grave abuse of the state courts by its efforts to enforce under state law agreements palpably violative of the antitrust laws. Either finding would also warrant an injunction under the concurring opinion.
>
> 3. In the alternative, that the District Court condition any dissolution of the preliminary injunction upon the *entry of an order along the lines of the "consent decrees"* Vendo offered in the lower court, which offer was renewed by Vendo before this Court in Vendo's opposition to respondents' petition for stay of mandate. The plurality opinion expressly relied on the availability of such relief in reaching its determination that the injunction should be reversed. Consequently, such decrees should now be entered by the District Court even if it should dissolve the preliminary injunction.

Thus, respondents' contentions in the District Court presently are—not that the District Court should overrule or ignore the Supreme Court—but that it should examine the trial court record, permit it to be supplemented by further evidence, and make

findings, fully warranted by that evidence, which would cure the deficiencies referred to in the Supreme Court's concurring opinion; or that, as a minimum, it enter a consent decree against Vendo along the lines discussed by the plurality opinion. All of these actions are fully within the power of the District Court upon remand, as the cases cited above (pp. 4-5) clearly demonstrate.

What Vendo fails to recognize is that its proceeding in this Court was an appeal from the entry of a preliminary injunction. A hearing on a preliminary injunction is not a full trial. A preliminary injunction is often entered on an incomplete record and it is perfectly proper to permit the District Court on remand to supplement that record, make additional findings and decide to issue or not to issue an injunction based on that supplemented record.

The reversal of a preliminary injunction does not finally determine the matter. It is in full "conformity with the opinion of this Court" to permit further evidence to be taken, to cure deficiencies in findings, and to issue or reissue an injunction warranted thereby. To do so would be to carry out, not to thwart, the order of the Supreme Court.

C. Vendo's Motion And Petition For Mandamus Are Premature And Unwarranted

Vendo's motion is based on nothing more than the failure of the District Court to act on Vendo's motion to dissolve (either to grant the motion, deny the motion, or, as respondents request, hold a hearing) in the two week period since this Court decided Vendo's Petition for Clarification.

Respondents submit that the district court should be given a reasonable time within which to decide Vendo's pending motion to dissolve.

Respondents further submit that if mandamus lies every time a new District Court Judge fails to decide within two weeks the 90 motions he is presented with upon his investiture, this Court

will be absolutely swamped with mandamus petitions. It is noteworthy in this regard that Vendo makes no mention whatever of the other fully-briefed motions pending before Judge Roszkowski in this very case.

CONCLUSION

Vendo seeks summary disposition of its motion to dissolve. It seeks to avoid a hearing on that motion and respondents' answer thereto. If Vendo's efforts are successful, Vendo will not only avoid an injunction, it will avoid even the protective provisions it has offered in its so-called consent decrees and in its assurances to the Supreme Court in its opposition to a stay of mandate pending rehearing.

This Court should deny leave to file the petition for mandamus. The case should be permitted to proceed in the District Court in conformity with the Supreme Court opinion. A hearing should there be held on Vendo's motion to dissolve and the answer thereto. When and if the District Court enters an order or takes other action not in conformity with the Supreme Court opinion, then it would be time for mandamus—not before.

Leave to file the petition should be denied.

Respectfully submitted,

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